

Kansas Law Protecting National Guard Members On State Active Duty

By Kyle E. Helmick¹

Kansas law comprehensively provides for reemployment rights for members of the Kansas Army and Air National Guard, as well as the Kansas State Guard,² when they are called to state active duty by the Governor of Kansas. Here is the relevant section:

(a) Any person who is *called or ordered to active duty by the state*, whether such person is a member of the *Kansas* national guard, *Kansas* air national guard, the *Kansas* state guard or other military force *of this state* and who gave notice thereof to the person's employer, upon satisfactory performance of and release and return from such military duty or recovery from disease or injury resulting therefrom, under honorable conditions, shall be reinstated in or restored to the position of employment, except a temporary position, which the person held at the time the person was called to duty. The person shall report to the person's place of employment within 72 hours after release from duty or recovery from disease or injury resulting therefrom, as the case may be, and the person's employer or the employer's successor in interest, whether an agency of the state, a political subdivision of the state or a private employer, shall reinstate or restore the person in the same position which the person left at the time of the person's call to duty at no less compensation than that which the person was receiving at the time of the person's call to duty or to a position of like seniority, status and pay. However, if the person is not qualified to perform the duties of the same position by reason of disability sustained during the person's call to duty but is qualified to perform another position in the employ of the employer or the employer's successor, the employer or the employer's successor in interest shall employ such person in another position, the duties of which the person is qualified to perform, that will provide like seniority, status and pay or the nearest approximation thereof consistent with the circumstances of the case. Any person called to duty shall receive, upon release under honorable conditions, documentation of honorable service to the state, as provided by the adjutant general.

(b) Any person who is restored to the person's position in accordance with the provisions of subsection (a) shall be considered as having been on temporary leave of absence during the period for which the person is called to active duty, shall be restored

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² The Kansas State Guard is a purely state military force, unlike the Army and Air National Guard, which have a hybrid state-federal status.

without loss of seniority, shall be entitled to participate in any benefits offered by the employer pursuant to established rules and practices relating to employees on leave of absence in effect with the employer at the time the person was called to duty as provided herein and shall not be discharged from the person's position without cause within one year after restoration to the position.

(c) It is understood and declared to be the intent of this section that any person who is restored to a position in accordance with the provisions of subsections (a) and (b) shall be restored in such manner as to give the person such status in the person's employment as the person would have enjoyed if the person had continued in such employment continuously from the time of the person's answering the call to state duty until the time of the person's restoration to such employment.

(d) An application on behalf of a person claiming to be entitled to any right or benefit under this section may be made to the attorney general. If the attorney general is reasonably satisfied that the person is entitled to the right or benefit sought, the attorney general may appear on behalf of and act as attorney for the person on whose behalf the application is submitted and may commence an action in the district court of the county for appropriate relief for the person. The district court of the county where the employer of a person claiming a right or benefit under this section, or the successor in interest to such employer, maintains a place of business shall have jurisdiction of any action filed by or on behalf of such person. If the court determines that the employer or the employer's successor in interest has failed to comply with the provisions of this section, the court may order the employer or the employer's successor in interest to: (1) Comply with the provisions of this section; and (2) compensate the person for any loss of wages or benefits suffered by reason of the failure of the employer or employer's successor in interest to comply with the provisions of this section. In addition, the court may order the employer or the employer's successor in interest to pay the person an additional amount equal to the amount authorized by subsection (d)(2) if the court determines that the employer or the employer's successor in interest willfully failed to comply with the provisions of this section. No fees or court costs shall be taxed against any person commencing an action under this subsection. The employer or the employer's successor in interest shall be deemed the only necessary party defendant to any such action.

(e) In any case in which two or more persons who are entitled to be restored to a position under the provisions of this section or of any law relating to similar reemployment or reinstatement benefits left the same position in order to enter the state call to duty, the person who left the position first shall have the prior right to be restored thereto, without prejudice to the reemployment rights of the other person or persons to be restored.

(f) Upon request, the adjutant general shall provide technical assistance to any person claiming to be entitled to any right or benefit under this section and, when appropriate, to the employer or employer's successor in interest. The adjutant general shall investigate the person's claim and attempt to resolve the claim by making reasonable efforts to ensure that the employer or employer's successor in interest complies with the provisions of this section. If such efforts are not successful, the adjutant general shall notify the person of the results of the investigation and the person's entitlement to proceed as provided by subsection (d).

(g)(1) An employer or an employer's successor in interest shall not be required to reemploy a person under this section if:

- (A) The circumstances of the employer or the employer's successor in interest have so changed as to make reemployment of the person impossible or unreasonable;
- (B) reemployment of the person would impose an undue hardship on the employer or the employer's successor in interest; or
- (C) the employment from which the person leaves to serve in military duty is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

(2) As used in subsection (f)(1), "undue hardship" means actions requiring significant difficulty or expense, when considered in light of:

- (A) The nature and cost of the action needed under this act;
- (B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- (C) the overall financial resources of the employer or the employer's successor in interest; the overall size of the business of the employer or the employer's successor in interest with respect to the number of employees; the number, type and location of its facilities; and
- (D) the type of operation or operations of the employer or the employer's successor in interest, including the composition, structure and functions of the work force of such employer or successor in interest; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer or successor in interest

With one exception, we are pleased with the wording of this Kansas law. We suggest that the Kansas Legislature amend this section to provide protection to members of the Army or Air National Guard of other states who hold civilian jobs in Kansas and who are called to state active duty by their own Governors. We have also urged all the other states, including Kansas' neighbors like Missouri, to make similar changes.

Slightly more than half (55%) of the Kansas City metropolitan area is in Missouri, and slightly less than half (45%) is in Kansas. There must be members of the Kansas National Guard who have civilian jobs in Missouri and members of the Missouri National Guard who have jobs in Kansas.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects the civilian jobs of Army National Guard and Air National Guard members when they leave those jobs for short or long periods of title 10 duty or title 32 duty (including drill weekends and annual training tours).³ USERRA does not protect National Guard members when they perform state active duty. The states need to enact broad and effective laws to fill this gap. Those state laws need to cover state active duty performed by members of National Guard units of other states, so that these cross-state individuals will not fall through the proverbial crack.

³ Please see Law Review 14071 (May 2014).